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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY
AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD.

STATEMENT AS TO JURISDICTION.

THOMAS W. DAVIS,
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Counsel for Appellants.

(36,891)

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vs.

KATHERINE H. FORD, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled case on appeal, respectfully show:

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of the Supreme Court of the United States on appeal is invoked by appellants under Section 237 of the Judicial Code (28 U. S. C. A., Section 344), as amended by the Act of February 13, 1925 (c. 229,

Sec. 1, 43 Stat., 937), and as further amended by the Act of January 31, 1928 (28 U. S. C. A., Sections 861*a*, 861*b*; c. 14, Secs. 1 and 2, 45 Stat., 54), and by the Act of April 26, 1928 (28 U. S. C. A., Section 861*b*; c. 440, 45 Stat., 466). The pertinent provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 344), are these:

> "* * * A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The two amendatory acts of 1928 mentioned above substituted an "appeal" for the "writ of error" specified in the amended Section 237 of the Judicial Code, so that Section 237 by reason thereof should now read "appeal" where it formerly read "writ of error."

B.

Date of the Judgment Sought to be Reviewed and Date on which the Application for Appeal was Presented.

The final judgment of the Supreme Court of South Carolina sought to be reviewed was rendered on May 11, 1932 (R. 181).

(References are to the printed record in the Supreme Court of the State and the unprinted *addenda*

thereto, the record not yet having been printed in this Court.)

The application for appeal was presented and allowed on June 13, 1932 (R. 225-227), within three months, as required by the Act of February 13, 1925 (28 U. S. C. A., Sec. 350; c. 229, Sec. 8, 43 Stat., 940). This appeal was allowed by the Chief Justice of the Supreme Court of South Carolina, and the citation was signed by him on June 13, 1932 (R. 227-231), in accordance with the provisions of the Act of March 3, 1911 (28 U. S. C. A., 868).

C.

Nature of the Case and Rulings thereon in the Court Below.

This is a suit instituted in the Court of Common Pleas in the State of South Carolina for personal injuries alleged to have been sustained by the appellee Katherine H. Ford as the result of a collision between an automobile in which she was riding and a railroad train of the appellant railroad company, operated by the appellant William Smith as engineer, at a highway grade crossing near Manning, South Carolina. At the time of such collision, the appellee was riding on the front seat of such automobile which was being driven by her husband, George C. Ford (R. 1). The complaint charged negligence and wilfulness on the part of the appellants in the operation of such train in a number of particulars, which are specifically set out therein (R. 2-5). As appeared from its allegations,

the complaint stated a cause of action under Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina for the year 1922 (R. 2-5).

The answer, after denying the allegations of the complaint, set up the affirmative defenses of gross contributory negligence and of contributory wilfulness on the part of the appellee, and in addition alleged that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, on which the appellee specifically relied in her complaint, were null and void as being a regulation of interstate commerce in violation of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and further that said Sections 4903 and 4925 as construed by the Supreme Court of South Carolina denied to the appellants the equal protection of the laws and deprived them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States (R. 6, 7).

The sections so attacked by the answer are as follows:

> "(4903) Signals to Be Given at Crossings.—A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at the distance of at least five hundred yards from the place or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a

standstill within less distance than one hundred rods of such crossing such bell shall be rung or such whistle sounded for at least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place: *Provided,* That a gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

"(4925) *Injuries at Crossings—Penalty and Damages.*—If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

At the close of the entire case, the defendants, who are appellants here, made a motion for a directed verdict in their favor (R. 138, 139). In this motion they attacked the constitutionality of Sections 4903 and 4925 above quoted on the following grounds:

1. That they deprive the defendants of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That they deny to the defendants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That they constitute an unlawful burden upon and interference with interstate commerce, in violation of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States (R. 138, 139).

After hearing full argument, the court refused to hold the sections unconstitutional and void as contended by the defendants in the trial court (R. 139-145). Thereupon, the defendants in the trial court renewed their attack on the constitutionality of the statutes in question by specific requests to charge (R. 145-148). Of these requests to charge, numbers 3 and 6 presented squarely the question of the constitutionality of the statutes in question under the commerce clause of the Constitution, while requests 4, 5, 7 and 8 likewise presented squarely the question of the constitutionality of these statutes under the Fourteenth Amendment to the Constitution. All of these requests were refused (R. 148).

Following the charge of the presiding judge in the trial court, the jury rendered a verdict in favor of the present appellee in the sum of $7,500.00 (R. 163). The defendants below thereupon submitted a motion

for a new trial upon the same grounds on which they had asked for a directed verdict, and thus presented to the court again the question of the constitutionality of these statutes (R. 163, 164). The trial court refused to set the verdict aside, and judgment was entered November 11, 1929, in favor of the appellee for $7,500.00 (R. 164).

From this judgment so entered in the trial court an appeal was then prosecuted to the Supreme Court of the State on a number of exceptions (R. 164-177). Of the exceptions so taken, numbers 2, 6, 9 and 12 raise the question of the constitutionality of these statutes under the commerce clause of the Federal Constitution, while numbers 3, 6, 7, 8, 11, 12 and 13 raise the question of the constitutionality of these statutes under the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Federal Constitution. So that it appears that the constitutionality of these statutes, both under the commerce clause of, and under the Fourteenth Amendment to, the Constitution of the United States, was attacked in the trial court by an affirmative plea in the answer, by a motion for a directed verdict, by requests to charge, and by a motion for a new trial, and that the attack was continued on the same grounds by proper exceptions in the Supreme Court of the State.

On the exceptions taken, the Justices of the Supreme Court were divided, and under the provisions of Article V, Section 12 of the State Constitution, the Circuit Judges were called in for assistance, thus con-

stituting the court *en banc*, as provided by that section. This Court, however, was but a session of the Supreme Court, as specifically held in the case of *Duncan* v. *Record Publishing Company*, 145 S. C. 196, 143 S. E. 31. The court so constituted passed on the constitutional questions presented by the exceptions of the appellants, and on May 11, 1932, filed final opinions in the cause (R. 181). The majority opinion overruled all of the exceptions of the appellants, and held that the statutes in question were not in any sense regulations of interstate commerce, did not deprive the appellants of their property without due process of law, and did not deny to them the equal protection of the laws, and therefore they were valid in all respects (R. 181-213). Mr. Justice Cothran of the Supreme Court had originally prepared a dissenting opinion holding the statutes in question to be unconstitutional and void for the reasons claimed by the appellants, but becoming incapacitated by reason of sickness, he was unable to sit with the Court *en banc*. His opinion, however, was adopted in full by Circuit Judge Grimball, and was concurred in by Circuit Judge Shipp (R. 213-224).

It thus appears that the constitutional questions were properly made at every stage in the lower courts, and that they were finally passed on and decided adversely to the contentions of the appellants by the Supreme Court of the State.

Under the practice in South Carolina, as shown by the certificate of the Clerk of Court attached to the record (R. 239), no formal judgment is entered by the

Supreme Court of the State, but the opinion itself is the final judgment.

The appellants contend in this Court, and contended in the courts below, that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina as construed by the Supreme Court of the State in its final opinion in the present case, as well as in a long line of cases prior thereto, involve a presumption of negligence and proximate cause raised by the arbitrary force of the statutes themselves, which remains as evidence on behalf of the appellee throughout the progress of the trial and the deliberations of the jury. In other words, the appellants contend now and contended in the lower courts that the statutes have been so construed by the Supreme Court of the State as to create an inference that is not merely temporary but which is given the effect of evidence to be weighed against opposing testimony and is to prevail unless such other testimony is found by the jury to preponderate.

In the trial court, the presiding judge ruled that the case was controlled by the decision of this Court in *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78 (R. 143, 144). The gravamen of the *Turnipseed* case was that the presumption created by the statute therein involved vanished as soon as evidence was introduced by the opposing side. This was distinctly ruled by this Court in *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. Ed. 884. Immediately after the trial court held that the *Turnipseed* case controlled the present case and that the statutes under attack were to be construed under the principles laid

down in that case, the defendants filed requests to charge numbers 4 and 5, which distinctly asked the court for a construction of the statutes in question that would bring them within the ruling in the *Turnipseed* case (R. 146, 147). In short, if the *Turnipseed* case applied, there was no presumption arising under the statutes in question, and if it did arise, it vanished when opposing evidence was offered by the defendants. The court without hesitation refused both requests to charge (R. 148), and such refusal was made the basis of exceptions 7 and 8 on the appeal to the State Supreme Court (R. 172, 173).

In addition to this, the trial court charged the plaintiff's fourth request to charge, which of itself was a distinct refusal to construe the statutes in question in accordance with the principles decided in the *Turnipseed* case, and this action on the part of the trial court was made the basis of the fifth exception to the State Supreme Court.

All of these exceptions were overruled by the Supreme Court of the State and the judgment of the lower court was affirmed. This action of the State Supreme Court showed beyond any question that it held clearly and unequivocally, despite any language in the opinion seemingly to the contrary, that the presumption did not vanish when evidence was introduced.

Such being the effect of the statutes, they violate the Fourteenth Amendment to the Federal Constitution within the principles announced by this Court in *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. Ed. 884, and the court below should have

so held and declared the statutes void for the reasons stated in the decision in that case.

In addition to this, the defendants below also raised the question of the application of the case of *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, 72 L. Ed. 167, to this case, especially under the Fourteenth Amendment to, and the commerce clause of, the Federal Constitution. The Supreme Court of the State held that, by virtue of these statutes, the law as declared by this Court in the *Goodman* case was not applicable in South Carolina, even as applied to trains engaged in interstate commerce and even though the denial of the application of the principles of such case did not afford to the railroads the same protection as it afforded to the users of highways in cases of accidents occurring by collisions at grade crossings. Other discriminatory features of the statutes were also fully argued before the State Supreme Court but these sections were held to be free of being obnoxious to the Constitution of the United States as contended by the defendants below.

D.

Cases Believed to Sustain the Jurisdiction.

Appeal is the remedy for the review of a decision of a State court of last resort where a State law is alleged to infringe the Federal Constitution.

Nashville, etc., R. Co. v. *White,* 278 U. S. 456, 73 L. Ed. 452.

Great Northern R. Co. v. *Minnesota,* 278 U. S. 503, 73 L. Ed. 477.

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926.

The Federal questions involved in the case were substantial, were properly raised, were considered by the trial court and by the Supreme Court of the State, and if they had been sustained, the judgment of the trial court would have been reversed and the complaint dismissed. They therefore presented matters properly determinable in this Court on appeal.

New York ex Rel. Bryant v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184.

Ex Rel. Missouri Insurance Co. v. *Gehner,* 281 U. S. 313, 74 L. Ed. 870.

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926.

Grubb v. *Public Utilities Commission,* 281 U. S. 470, 74 L. Ed. 972.

Brinkerhoff-Faris, etc., Co. v. *Hill,* 281 U. S. 637, 74 L. Ed. 1107.

That Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina for 1922 deprive the appellants herein of their property without due process of law and deny to them the equal protection of the laws, we contend is settled by the decisions of this Court in the following cases:

Western & Atlantic R. Co. v. *Henderson,* 279 U. S. 639, 73 L. Ed. 884.

Mobile, etc., R. Co. v. *Turnipseed,* 219 U. S. 35, 55 L. Ed. 78.

Chicago, etc., R. Co. v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979.

Frost v. *Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483.

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

Gulf, etc., R. Co. v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

Likewise, the following cases, we contend, demonstrate that these sections of the statutes constitute an unlawful regulation of and a burden upon interstate commerce, and are therefore void as infringing the Federal Constitution.

Atlantic, etc., R. Co. v. *Georgia*, 234 U. S. 280, 58 L. Ed. 1312.

Southern Ry. Co. v. *King*, 217 U. S. 524, 54 L. Ed. 868.

Seaboard, etc., Ry. Co. v. *Blackwell*, 244 U. S. 310, 61 L. Ed. 1160.

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. Ed. 167.

It is, therefore, respectfully submitted that the Constitutional questions have been properly presented, that they are substantial, that they were passed on adversely to the contentions of the appellants by the State Supreme Court in its final judgment, and that by reason thereof this Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended.

Respectfully submitted,

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